ARMED FORCES PERSONNEL AT THE ALTAR OFJUSTICE: IS JUSTICE SEEN TO BE DONE?

(Need for an Independent and Impartial Indian Military Justice System and Time to Discontinue Summary Court Martial)

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28th September, 2011

PREFACE

I have spent four decades of my conscious life not only first as a daughter, then as wife and now as a mother in the extended family of the Armed forces. I am a practicing lawyer, an honourable profession which I forayed into very late in my life and that too all courtesy my four year travail and tribulation while fighting for the vindication of my rights against a Army General[1]. It was after this episode and my joining the legal fraternity that I have witnessed the spiraling growth of dissatisfaction, ire and frustration among the Armed Forces Personnel, stemming from the dispensation of justice meted out to them by a justice system which seemingly does not uphold the tenets of independent and impartial justice system or follow due process of law in summary trials.

One can argue that my emotions may mar the output of my research as I myself have been at the receiving end of this justice system and my efforts would be biased due to over reasoning. But I strongly believe that emotions can be appreciated within the reach of reason as Professor Amartya Sen puts it that "if we are strongly moved by some particular emotion, there is a good reason to ask what that tells us. Reasons and emotions play complementary roles in human reflection."[2] Thus keeping reasoning power and reasoned scrutiny as my ally as well as taking in counter arguments and other grounds that may yield the opposite conclusion, I shall pursue my research goals with ethical objectivity and impartiality. At this point there is some merit in fortifying my convictions with the ideas of John Rawls, who argues: 'the first essential is that a conception of objectivity must establish a public framework of thought sufficient for the concept of judgment to apply and for conclusions to be reached on the basis of reasons and evidence after discussion and due reflection'.[3]

It is under these circumstances that I plan to research and am confident that since I was a party directly involved, my perspective and reasons coupled with other factors and responses can bring important insights and help in discerning into an evaluation as to whether justice is really seen to be done in respect of the armed forces personnel. In this context I would like to quote Prof. Amartya Sen, " when we try to determine how justice can be advanced, there is a basic need for public reasoning, involving arguments coming from different quarters and divergent perspectives. An engagement with contrary arguments does not, however, imply that we must expect to be able to settle the conflicting reasons in all cases and arrive at agreed position on all issues."[4]

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[1] *MS.Jyoti v State of Karnataka and Others* S.L.P (C) 1045-1046 OF 2002 , arising out of Crl P 2732/ 2000 and between *MS Jyoti v Lt. Gen D.B.Singh, Commandant MCEME, Secundrabad and Union of India,* Crl P 3622/ 2000 (unreported case) .

[2] Amartaya Sen, *The Idea of Justice* p 39 (Allen Lane, an imprint of Penguin Books, 2009).

[3] John Rawls ,*A Theory of Justice* (Clarendon Press, New York, 1971).

[4] Amartaya Sen, *The Idea of Justice* p 392 (Allen Lane, an imprint of Penguin Books,2009)

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INTRODUCTION

The principle that a court of law should be independent and impartial is firmly embedded in all legal systems and in all major international human rights instruments[5] as well as in our Indian constitution and our statue books.[6] The common elements to all these texts appear to be tribunal, independent, impartial, and established by law.[7] The guarantee of independent and impartial courts adhering to due process at all stages, being part of key parameters of the right to a fair trial and being the foundation of the rule of law, ensures that the individual human and constitutional rights of a party to a dispute are decided by a neutral authority or body, be it judicial or quasi-judicial.

In the context of Indian Military Justice System it may be argued that it is a self contained system with appropriate checks and balances but fair and impartial operation of a system that principally relies on the discretion of the commander or the convening authority to determine what cases to prosecute and concentrating too much power in his hand, makes him the dispenser of favour or fortune marring the image of impartiality and independence and in turn the perception of fairness to the public and the soldier is also affected. The recently instituted Armed Forces Tribunal have in all fairness given the forces personnel the right for further Appeal, but it shall be more effective when the military justice system from the first step have both the subjective element and objective elements of an independent and impartial tribunal established by law.

When the public in general talk about justice they associate it as a matter of giving each their dues. When I talk about justice in the military context it is the aspect of procedural justice which can be attained by making and implementing decisions adhering to due process of law by which citizen soldiers are treated fairly. It is not sufficient to say that due to the overriding importance of maintaining discipline it is alright to apply lesser due process and consequently argue that if any illegality or capricious or arbitrary decisions are made by the judges of the military justice system, the AFT or the High Courts or the Supreme Court are there to deal with such improper decisions. Military as an institution should be just as it will in turn instill a sense of stability, well being and satisfaction in its members and avoid perceived sense of

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[5] See e.g. Article 14 (1) of the International Covenant on Civil and Political Rights (hereinafter ICCPR) of which India is a signatory and is bound by its provisions ; Article 6(1) of the European Convention on Human Rights (hereinafter ECHR); Article 8(1) of the American Convention of Human Rights (ACHR).

[6] Art.14 states: "*The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India",* Section.327 Civil Procedure Code(hereinafter CPC) States: " *For a trial to be fair, it must be an open court trial."* Section 191 CPC, states: *"An accused shall be informed that he is entitled to have his case tried by another court. However, he has no right to select or determine by which other court the case is to be tried"*

[7] Article 14 ICCPR reads "*All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law*". Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms reads, "*In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law*." Article 10 of the Universal Declaration of Human Rights says, *"Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him."*

injustice which might lead to dissatisfaction and rebellious feeling. According to Mischelle Maiese principle of justice and fairness is central to procedural justice. She says that people feel affirmed if the procedures that are adopted treat them with dignity and respect making it easier to accept even outcomes they do not like.[8]

It should be understood that discipline in the Armed Forces cannot be maintained upon domination and implicit obedience to the order of the superiors just because their members have voluntarily submitted themselves to the existing system with all its defects, and so it will be wrong to conclude that no reform is called for. Justice and discipline has not been equally balanced so as to make the Armed Forces Personnel feel that they belong, not to a separate class of people but are the citizens of India.

The thesis is divided into six Chapters, the first chapter will give an introduction containing insight into the topic of the thesis, purpose of this study, hypothesis, research question, review of existing literature review and research methodology. The second chapter contains the historical background of the Indian Military Law pertaining to Court martial proceedings of the three wings of the Armed Forces and its present status for a better understanding of their impartial and independent nature as well as insight into the military laws of the United Kingdom from whom our Military Law originated and that of United States of America whose military laws were also fashioned on the British Military Laws and finally international treaties and conventions which deal with fair trial will form a part of this chapter. The third chapter will include the balance between justice and discipline in the background of Military Justice System., subjective element and objective elements of an independent and impartial Court established by law and its presence in the military justice system, the correlation between Article 33 and Article 21 of the Indian Constitution, the need for discontinuing Summary court martial procedure, legality of certain select sections in the military act will also be gone into and their desirability in the statute books would be discussed and lastly the role of the Legislature and the Indian Judiciary would be gone into m m. Fourth chapter shall deal with role of the convening authority and unlawful command influence as well as seepage of corruption due to its effect in Indian Military Justice System. Comparative changes in the Military laws of the United Kingdom and the United States of America to changed paradigm of law along with critical analysis based upon respondent's views, who will be part of this research study will be the subject matter of the fifth chapter along with proposed reforms. Sixth chapter will contain conclusion, recommendation and future research suggestion.

[8] Maiese, Michelle, "*Procedural Justice Beyond Intractability*," in Guy Burgess and Heidi Burgess (eds.). *Conflict Research Consortium* (University of Colorado, Boulder. Posted: January 2004), *available at* : <http://www.beyondintractability.org/bi-essay/procedural_justice/>. (Visited on 05.03.12.).

PURPOSE OF STUDY

Our armed forces of more than 1.5 million citizen soldiers represent one of the most disciplined and patriotic sections of our society. It is his sense of duty, his sense of pride and his self-discipline which is more important and which propels him than a discipline which is imposed. Like every citizen the citizen soldier whose rights are affected, has the right to legal recourse. Such recourse in case of soldiers, even though abrogated, is only useful if the quality of the administration of justice meets minimum requirements of a fair trial. The right to an independent and impartial Courts established by law following due process at all stages is a prerequisite of fair trial. Due to lack of independence and impartiality of the Court Martial judges, as would be brought out in this thesis, there seeps in perceived sense of lack of fair trial. The objective then is to find out how the military justice system can be suitably changed to embody the tenets of impartiality and independence and make it more humane and dynamic as also to bring it in tune with the culture in the Armed Forces of the developed countries.

Right to Life and Liberty in the scheme of our Constitution was placed at the paramount position and all other rights enumerated under Articles 14 to 32 of the Indian Constitution were incorporated as means to protect and secure that very right to Life and Liberty to each individual sovereign member of the polity from encroachment by any other person or authority or even the State. We held that this right to Life and Liberty was equally the inalienable possession of each and every person irrespective of his or her caste, creed, colour or country. That was why we used the word 'PERSON' instead of CITIZEN or any other description while declaring these rights as being inalienable under Article 21. Article 33 of the Constitution laid down that, Parliament may, by law, determine to what extent any of the rights conferred by this Part [III of the Constitution] shall, in their application to members of the Armed Forces, be restricted or abrogated so as to ensure the proper discharge of their duties and maintenance of discipline among them. But while enacting Article 33, the framers of our constitution did not define the phrases; (a) proper discharge of their duties; and (b) Maintenance of discipline which has lead to problems as everybody, The Legislature, The Executive, The Judiciary; and above all; the members of Armed Forces have their own concept of discipline and its maintenance and none of these concept coincide with one and other. Moreover, the concept; one has of Discipline; undergoes a sea change between situations when it is applied to him and when he applies it to his subordinate. The endeavor then would be to find a correlation in the scheme of our Constitution between Article 21 and 33.

The convening authority plays a central role in the prosecution of a case. All of the members comprising the Assembly of the court-martial are subordinate in rank to him and under his overall command which manifestly implies some form of command influence, whether lawful or unlawful. He also acts as confirming officer and has the power to vary the sentence imposed as he deems fit. These circumstances give serious cause to doubt the independence of the military Courts from the prosecuting authority and some form of corruption to be prevailing in the justice system. Court-martial Assembly contains no judicial members or legally-qualified members. Moreover court martial are set up on an *ad hoc* basis and the convening officer has the power to dissolve it either before or during the trial. The judge advocate's involvement is not as a member of the court-martial as he does not take part in its deliberations and is in it only as in an advisory capacity giving his advice on sentencing in private. Thus the aim would be to know what constitutes unlawful command influence. Does

too much concentration of power in the convening authority make him susceptible to corruption or corrupt practices and what would be his liability when his actions are biased, prejudiced and arbitrary? Can the members of the Court Martial retain their independence and impartiality and render justice following fair trial.

Law's which are vague, ambiguous and to which crimes are not specified fails to give adequate guidance to the citizen soldiers as to the ascertainable standards of guilt and hence trial on such vague offence cannot be fair to our soldier. Certain Sections like 45 and 63 pertaining to unbecoming conduct and conduct prejudicial to good order and military conduct, of the Army Act and their corresponding Sections in the Air Force and Navy Act, which are extraordinarily general in their wording, seem to cover almost any disruptive behavior in a military environment. Men of common intelligence cannot be required to guess the scope of such ambiguous sections. Acts which are made thus criminal must be defined with appropriate definiteness. The purpose of this study would be the analysis of these sections of the Military Law which are vague and ambiguous and their desirability in the statute books.

Article 14 in particular lay's down, "The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India." But the summary court martial being a part of only Army Act and not Air Force and the Navy Act's itself makes it unconstitutional under Article 14 of the Indian Constitution as it nullifies the essence of equality before law. Further, in the Summary court martial proceedings there is less observance of due process of law even though the procedures contained therein are in tune with fair trial. Though after the constitution of the Armed forces Tribunal, there is right of appeal against the decisions given in summary court martial (hereinafter SCM) proceedings, but the catch is that the punishment should exceed imprisonment for a period of three months. Thus soldiers getting imprisonment upto three months cannot rely on any justice when faced with arbitrary, biased or false convictions. The quantum of punishment awarded in these proceedings for an offence is hugely disproportionate to the offence. It becomes imperative thus to analyze whether there is any necessity to follow SCM in times of peace.

Thus the moot question here is though essence of fair trial may be a part and parcel of the Indian Military Justice System but is justice really seen to be done? One of the main reasons for the lack of any effective changes brought out in the recent years is the lack of parliamentarian oversight in this matter. Some amendment to the Armed Forces Act is certainly beneficial but there is a need for comprehensive amendment and not cosmetic changes and an even comprehensive Act is needed to advance justice. Failure to do this, consequently, it won't be difficult to explain the phrase first uttered by Lord Hewart[9], with his admonishment that justice 'should manifestly and undoubtedly to be seen to be done'. Last but not the least would be the endeavour to find out whether the purpose of Indian military justice system is justice or discipline? How it can be dispensed effectively respecting the individual's dignity while maintaining discipline in the Armed Forces. This also requires study of military laws of the United Kingdom from whom our military law originated and the United States of America whose military laws are also shaped after it and who have themselves undergone sea change to accommodate and adapt itself to the changed circumstances and keeping in the forefront the notions of fair trial.

[9] *Rex v. Sussex Justices Ex parte McCarthy* [1923] All ER 233.

HYPOTHESIS

1. Courts-Martial as an institution is not an independent and impartial Court due to lack of independence of the members of the Courts-Martial Assembly.
2. Summary proceedings are inherently unjust according to fair principles reflected in common and international law in the way they are administered with a reduction of due process.
3. Any part of an enactment is void if it is vague and its prohibitions are not clearly defined.

RESEARCH QUESTIONS

1. What is the concept of justice and procedural justice in the Indian Military Justice System? Is the justice system impartial and independent?
2. Does Summary Court Martial lack the elements of due process and hence unconstitutional?
3. Is the self contained Military Justice system prone to corruption or corrupt practices due to unlawful command influence? Should offences in the military law that are vague be declared void?

LITERATURE REVIEW

A comprehensive work and a beacon to my research study was 'The Military Justice System In India: An Analysis'[10], by U .C. Jha. It presented an insight as to what is the concept of justice applicable to the Armed Forces Personnel under the Military law. The first chapter of the book deals with the concept of justice wherein the author has collated notions of justice from writings of Aristotle, Plato, Cephalus, Cicero to John Locke, Jeremy Bentham, John Rawls etc, and has very lucidly infused these notions into bringing forth the importance of justice in the Military Justice System in India. He has stressed that Armed Forces as a social institution, have several functions, interacting with the other component of social structure and maintaining stable peace in the social life and in the International both in peace and war. The forces have their own judicial system dispensing justice while aiming at maintaining discipline. He further stresses that it is the fundamental obligation of the state to make adequate laws and organize an efficient legal and justice system for the Armed Forces that is worthy of respect and embodying notions of justice. Security in a society cannot be expected if the provider suffers from a sense of injustice. He has brought out the difference of dispensation of justice in the Forces and the civil life. The military justice system is not only more severe but it also forbids a number of acts acceptable in the civil life.

U .C. Jha quoted Bentham[11], who said "….When applied to an institution, justice requires the elimination of arbitrary distinctions and the establishment within its structure of a proper balance and equilibrium, between competing claims," this made me go through Bentham's book on 'Introduction to the Principles of Morals and Legislation'. The book presents an ethical theory that actions are right till the time they produce pleasure or prevent pain and that the purpose of civil and criminal laws is to maximize the amount of pleasure for the enjoyment of the society. Bentham argues that if utility is defined as the ability to produce happiness, then the rightness of an action is determined by its utility. He goes further and stresses that if happiness is viewed as the only thing which is good, the principle of utility is the only right principle of human action. Seen in the military context, a country's ability to order its military to face dangers they had not bargained on in joining the forces can be justified, as, inability to enforce discipline and the ability of soldiers to pick and choose which orders to follow would result in an almost indefensible state. Thus, the greater good would require that the country can order its military about as it sees fit. But this principle is highly detrimental to the basic rights of its personnel as at one level rights are those claims which protect individuals from being subjected to calculations of pure utility. The promotion of the greatest happiness for the greatest number cannot justify some violation of an individual's welfare, if that individual has a right to the benefit in question. A prime motivation for rights in general is to ensure that no-one is subject to unbridled calculations of utility, so that a minority does not suffer in order that a great number enjoy some benefit. Bentham in the fourteenth and fifteenth chapter of the book entitled, 'Of the Proportion Between Punishments and Offences' and 'Of the Properties to be Given to a Lot of Punishment' argues that the punishment of illegal offenses against society should be proportional to the amount of harm which is caused by these offenses. Punishment of offenses is not justified if it is disadvantageous or needless. The amount of punishment for an

[10] U. C. Jha, *The Military Justice System in India: An Analysis* (LexisNexis, Butterworths Wadwa, Nagpur, 2009).

[11] Jeremy Bentham, *Introduction to the Principles of Morals and Legislation* (Hafner, New York, 1948).

offence should be sufficient to deter further offences but should not be unjust or arbitrary. Bentham also contends that any form of punishment for violating civil or criminal laws should conform to the principle of utility. Any punishment which is inflicted upon an offending individual should have a sufficient ground for the infliction of pain upon that individual. The purpose of punishing illegal offenses against society is not only to prevent similar or greater offenses but to offer satisfaction to those who have been injured and to discipline and reform the offender. These two chapters have given this research study direction in understanding the proportionality of punishment vis-à-vis the offence.

Professor Amartya Sen, a development economist who has been conducting relentless "internal criticism" of concepts of justice and equality over the past many years, his book, 'The Idea of Justice'[12] concentrates on the real behaviour of people and its actual outcomes. Taking a cue from "social choice theory", he wants us to focus on removing injustices on which we can all rationally agree and this is exactly what is needed regarding the military justice system whereby on the face of it most of the procedures seem to be in sync with the notions of fair trial but in reality concentration of power in the hands of the convening authority and the fact that all the members of the Court – Martial Assembly as well as the JAG officer are under his command, does not make the Court, independent and impartial and thus it is time for our Parliamentarians to agree that it's time to revamp the Indian Military Justice System to the changing time . In his book the message is very clear-we can choose to do something about injustices that emerge from a conscious design of those wanting to bring about that outcome. In the Indian scenario, parliamentarian oversight is required to bring in changes to the military law. According to Sen, when people across the world agitate to get more global justice they are not clamouring for some kind of minimal humanitarianism. They are sensible enough to know that a perfectly just world is a utopian dream. All they want is the elimination of some outrageously unjust arrangement to enhance global justice. In case of military justice system also one cannot expect a totally impeccable justice system but what is apparently unjust and against the essence and spirit of fair trial, or the essence of our Constitution, should be discontinued or adopt procedures which can make the public, the victim and the accused foster faith in the system. According to Sen, justice and a perfect social order has to be non-parochial, inclusive and humane. It is based on reasoning and helps to remove inequities. According to him, justice must be free from the domination of the will of majority and one that touches lives that people actually live. Ability of reasoning is crucial for making societies less unjust. The book is in four segments - The Demands of Justice, Forms of Reasoning, Materials of Justice and Public Reasoning and Democracy.

In 'A Theory of Justice'[13] by John Rawls, Rawls addresses the question- What is a just society? John Rawls attempts to formulate a philosophy of justice and a theoretical program for establishing political structures designed to preserve social justice and individual liberty. Rawls writes in reaction to the then predominant theory of utilitarianism, which posits that justice is defined by that which provides the greatest good for the greatest number of people. Rawls proposes a theoretical person who, shrouded in a veil of ignorance, must design a just society without foreknowledge of his or her own status in that society. He asserts that from this objective vantage point, which he calls the original position, the individual will choose a system of justice that adequately provides for his needs. In the context of Armed Forces

[12] Amartya Sen, *The Idea of Justice* (Allen Lane, an imprint of Penguin Books, 2009).
[13] John Rawls, *A Theory of Justice* (Clarendon Press, New York, 1971).

personnel it can be argued that they under the veil of ignorance assent to rules governing their basic social structure before being subject to them as they know nothing about the particular interest they would acquire as soldiers. What they know is only the basic interest they bring to our country as soldiers defending its territory and upholding its Constitution. They are not in a position to choose an adequate system of justice. Are they then mere slaves and not citizens of a just society? Rawls is not just an authoritarian but also elitist and Eurocentric. Rawls openly acknowledges that the world's poor have no place in his theory of justice. Indeed, the very "idea of global justice" is dismissed by Rawls and his cohorts as totally irrelevant. Thus I feel that theories of justice that exclude, by definition, the poor or issues of global injustices only perpetuate injustice. The main function of Rawls's theory of justice, it seems, is to maintain the status quo, where injustice is not just simply a part of the system, but the system itself.

A book edited by Eugene. R. Fidel and Dwight Hall Sullivan named 'Evolving Military Justice'[14], containing articles of various authors and divided into six parts with seventeen articles. Part two, chapter three and part six chapter fifteen deals with the need for independence of judiciary and a fair trial.[15] This article in chapter three originally appeared in the Wake Forest Law Review.[16] In chapter three it is argued that military trial judiciary has become the key institution within the military justice system and thus there is a need to ensure that military judges are and appear to be independent. Chapter fifteen which is an article by John Mackenzie,[17] a British Solicitor who successfully litigated the famous case of Findley[18], argues that even after the reform by the Parliament in 1996 of the military justice system, it remains incapable of dispensing justice and that the system cannot be impartial as long as Army personnel administer it. The Article originally appeared in the New Law Journal.[19] The review of this book was done since the origin of Indian Military Law is from the British and the United States in 1775 and in 1806, modeled their articles of war on the British Mutiny Act and articles in force at the time. Thus the military laws of the three countries at their inception had lot in common and it is easier to understand that when they can change according to the needs of a progressive society, so can we, with due interest of our legislators in the matters relating to the Armed Forces personnel.

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[14] Eugene. R. Fidel and Dwight Hall Sullivan, *Evolving Military Justice* (Navel Institute Press, 291 Wood Road,Annapolis, MD21402, 2002), *available at*: http://books.google.co.in/books?id=G3tYljWV_zEC&printsec=frontcover&source=gbs_ge_summary_r&cad=0#v=onepage&q&f=false (visited on 01.03.12).

[15] Fedric. L. Lederer, Barbara Hundley Zeliff, *"Needed an Independent Military Judiciary. A Proposal to Amend the Uniform Code Of Military Justice"* in Eugene. R. Fidel, Dwight Hall Sullivan et.at.(eds.) *Evolving Military Justice* (Navel Institute Press, 291 Wood Road,Annapolis, MD21402, 2002)

[16] Fedric. L. Lederer , Barbara Hundley Zeliff, *"Needed an Independent Military Judiciary. A Proposal to Amend the Uniform Code Of Military Justice"* WFLR 1213 (1997).

[17] John Mackenzie, "*A fair And Public Trial"* in Eugene. R. Fidel, Dwight Hall Sullivan et.at.(eds.) *Evolving Military Justice.* (Navel Institute Press, 291 Wood Road,Annapolis, MD21402, 2002 Butterworth and Co. Publishers).

[18] *Findlay v. The United Kingdom*, 110/1995/616/706, Council of Europe: European Court of Human Rights, 25 February 1997, Available at http://www.unhcr.org/refworld/docid/3ae6b66d1c.html (visited on 08.10.11)

[19] John Mackenzie, "*A fair And Public Trial"* 150 New L.J 516(2000)

David. A. Reidy's articles[20] introduces a thematic cluster of entries on John Rawls and his theory of justice. What was more topical to this thesis was his entry on procedural justice and legitimacy. This entry discusses the role(s) played by ideals of procedural justice and legitimacy in Rawls's justice as fairness. It first sets out several different ideals of procedural justice. It then discusses the roles played in justice as fairness by the ideals of pure and quasi-pure procedural justice. It concludes with a discussion of legitimacy as a moral property of coercive state action and the nature and limits of the duty citizens have to obey or at least acquiesce to legitimate laws and coercive state actions.

The review on an Article by Michelle Maiese[21] begins by describing what procedural justice is. She writes that fair procedures should guarantee that like cases are treated alike and that people feel affirmed if the procedures that are adopted treat them with respect and dignity, making it easier to accept even outcomes they do not like.

A paper submitted for Honour Thesis by Claire Newhouse[22]wherein Chapter I initially provides a review of the Australian military justice system necessary to an understanding of summary proceedings. Chapter II introduces McBarnet's theory of the ideology of triviality in the lower courts and considers its application to the operation of summary proceedings. McBarnet claims that there are two reasons for lack of due process in summary proceedings, one being that offences and punishments are trivial and the second being that this process does not involve much law or lawyers. But this thesis points out that while some offenses and punishments may be trivial others have a potential to seriously hamper personnel's lives. The lack of lawyers and the fact that such proceedings are held in closed courts are also contributing to lack of due process. Chapter III is a case study which explores and tests McBarnet's theory for why due process is not present in the lower courts. This chapter demonstrates that despite the triviality placed on lower court hearings, because there is considered to be not much law involved, the opposite is in fact true.

An article by Divi Jain[23] amply brings to light that military law in India needs a new jurisprudence and new standards towards protection of human rights. It is the prime duty of the State to protect his right to a fair justice system. Trial by summary Court martial, a handful of which has come up for scrutiny, has been frowned upon by the Supreme Court which only adds to the strength and provides evidence about the lack of due process and poor quality of justice provided to the Indian soldiers.

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[20]David A. Reidy, "*John Rawls: Procedural Justice and Legitimacy" available at* vrenc.info/index.php?title=D._John_Rawls:_Procedural_Justice_and_Legitimacy&action=edit (visited on 03.03.12).

[21] Maiese, Michelle, "*Procedural Justice Beyond Intractability*." in Guy Burgess and Heidi Burgess et. at. (eds.). *Conflict Research Consortium* (University of Colorado, Boulder. Posted: January 2004), *available at* <http://www.beyondintractability.org/bi-essay/procedural_justice/>. (Visited on 05.03.12.).

[22] Claire Newhouse ,*Summary Proceedings Within the Australian Military Justice System: How and Why Are They Inherently Unjust?* (31st October 2005) (Unpublished Honour thesis for Faculty of Law, The Australia National University). *available at*: www.scribd.com/doc/50489718/10/II Summary-Proceedings-An-'Exceptional'-Proceedings (visited on 29.02.12).

[23]Divi Jain, "Summary Court Martial and the Indian Judiciary", *Legal Service India.com* 5th October 2007 *available at* http://www.legalserviceindia.com/article/l30-Summary-Court-Marital-And-The-Indian-Judiciary.html (visited on 08.03.12).

Miller, Seumas, "Corruption", The Stanford Encyclopedia of Philosophy[24], highlights institutional corruption. Article, 'Handbook on Fighting Corruption'[25] will also be perused for this research question. Journal by Paul Mahony[26] given in Judicial Studies International Journal, an expanded text of a presentation made at the National Judicial Conference organised by the Judicial Studies Institute in Dublin will also form a part of literature review.

The military law contains sections like section 45 and 63 of the Army Act and its corresponding sections in the Air Force and Navy Act under which offenses are not specified. For understanding whether these sections need to be declared void, various articles and research papers shall be reviewed.

[24] Edward N. Zalta (ed.) Miller, Seumas, *"Corruption", The Stanford Encyclopedia of Philosophy*, Spring 2011 Edition , *available at* <http://plato.stanford.edu/archives/spr2011/entries/corruption/ (visited on 29.09.11).

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[26] Paul Mahony , "Right to Fair Trial in Criminal Matters, Under Article 6, E.C.H.R," *JSIJ*, (10-11 November 2001). *available at*: www.jsijournal.ie/html/volume%204%20No.%202/4%582%5D_Mahony_Right%20to%20a%20Fair%20Trial%20in%20Criminal%20Matters.pdf (last visited on 25.09.11).

RESEARCH METHODLOGY

Research refers to a search for new facts or knowledge through systematic and scientific way. In other words, the aim of a research is to find out solutions to specific problems through application of scientific procedure. To quote John (1977) "Research is a more systematic activity directed towards discovery and development of an organized body of knowledge." Empirical data alongside conceptual and theoretical armoury occupy a significant place in social science research as none alone can lead a researcher to a logical end.

STYDY DESIGN/ RESEARCH PLAN

The whole research would be exploratory with qualitative study. Review of existing work in this field will be done and all information will help in furthering this research. Persons who by the virtue of their jobs are able to give valuable insight into the research shall be interviewed and their inputs taken. Study of select cases and observation given by the Hon'ble Supreme Court, High Court's and the Armed Forces Tribunal will be done and stimulating insights will be incorporated. Questionnaires will be distributed to Army, Air Force and Navy personnel's and if permission is granted then Focused group discussion will be arranged to get the opinion, for and against as to the need for change in the Military laws and to glean out their idea of justice and the legality of vague sections in their statute books.

SETTING

The research study will be done by employing a combination of historical, empirical, comparative and critical method. For this extensive use of legal libraries, observing the working of Armed Forces Tribunal in their dispensation of justice, at Kolkata Bench will be done. Interviews of writers who have written on this subject, eminent lawyers who deal with cases of the Armed Forces, officers of the Judge Advocate Generals Branch and personnel of the Armed Forces who have been on the receiving end of Military Justice System, will be taken. Since this research study germanise from involvement of the researcher in the Military Justice System as a victim, efforts would be made to interview the prosecutor in the given case to get a clear understanding of the working of the system.

DURATION OF STUDY

Review of literature in the form of articles, blogs posted in the internet, books and literature pertaining to Military justice system, both, by Indian and foreign authors, books relating to Indian Constitution highlighting the correlation between Article 21 and Article 33, study of historical materials pertaining to the Military justice system, relevant legislative debates, selected cases of the Supreme Court etc will be done. The study has commenced from 1st September 2011 and will be culminated by the February 2013.

DATA COLLECTION PROCEDURE

Qualitative research method shall be resorted to. Study will rely both on primary sources as from interviews, focused group discussion, questionnaire, observations and experience alone.

Secondary data will be gathered from historical materials, judicial pronouncements and academic writings selected from within the universe of study. Before data are collected through interview, observation or focus group, a check list comprising of the following, shall be designed:

- **Observations**: list of focal points for observation.
- **Interviews**: informed consent forms, interview question guide, reimbursement forms
- **Focus groups**: informed consent forms, focus group question guide, note-taker form, debriefing form.

All data, both electronic and paper, will be organized and identified according to archival numbers - numbers assigned in sequential order to each data collection event. The archival number will be used to label all documentation related to a particular data collection event. The archival log, which is the list of sequential numbers assigned to each data collection event and is used to track data, will be created.

In-depth interviews and focus groups will be tape-recorded whenever possible. Preparing these recorded data for analysis will require transcribing all tapes and typing the transcriptions into computer files. Before transcription, the tabs on the tapes would be punched to prevent them from being recorded over. Next, backup copies of the tapes would be made. The backup copies will be securely stored in a separate location from the original tapes.

Handwritten notes will be taken to document a wide range of information, including:
- casual and structured observations,
- verbatim quotes,
- paraphrases of participant responses,
- interview and focus group backup documentation and
- the researcher's questions.

These notes will be written on standardized forms, the interview or focus group question guide, or field notebooks, according to the situation.

DATA ANALYSIS PROCEDURE

Because they capture the thoughts and experiences of individual people, every set of qualitative data collected (from every participant observation event, interview, questionnaire and focus group discussion) is distinct. Thus, systematically comparing and analyzing qualitative data in raw form is challenging. Organizing data in a rigorous, standardized way is essential to their security and to the validity of the study results, After the required data is collected and tested again and again for uniformity, the qualitative data will be converted to quantitative so as to reduce the huge quantity of data into manageable proportion making it feasible to further process the data more systematically.

The large variety of responses to the different questions posed to the sample of respondents while interviewing or the different problems and responses received during the focused group discussion shall be classified into limited categories so that appropriate answers to our

research question can be obtained. The data thus obtained shall be tabulated to make the purpose of the research clear and to make comparisons easy.

Finally in the light of the hypothesis and research questions the data thus collected and processed shall be analysed. The interpretation shall explain the general factors as has been observed during the course of our research and will guide others for further research.

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